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In the Supreme Court of the United States

OCTOBER TERM, 1934

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COLEMAN-GILBERT ASSOCIATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

COLEMAN-GILBERT ASSOCIATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above cause on February 27, 1935.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 14–19) is unreported. The opinion Circuit entered in the above cause on February 27, of the Circuit Court of Appeals is reported in 76 F. (2d) 191.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 27, 1935. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Coleman-Gilbert Associates is an association or a trust.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved appear in Appendix A, infra, pp. 7–9.

STATEMENT

The petitioner was created November 8, 1926, under an indenture of trust. (R. 15.) The creators of the trust (Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine) deeded to themselves as trustees various items of property. (R. 8, 15.)

During the years in question (1927, 1928, 1929) the trust owned and operated some twenty apartment houses, the annual gross rents amounting to about $420,000. (R. 15.) While the trustees themselves drew no salaries, the employees' pay roll totaled about $25,000 per year. (R. 16.) The annual operating expenses were over $300,000. (R. 16.)

The female trustees were inactive in the trust, but the three male trustees took active parts in the management. One of the latter was actively engaged as to a portion of the trust, while the other two devoted their entire time to the whole trust.

(R. 16.) An office of three persons, besides the three operating trustees, was required to maintain the necessary financial records. (R. 16.)

The operating trustees supervised the maintenance of the trust properties, performing the functions of building managers and superintendents. They collected rents, provided for repairs, purchased supplies, arranged loan financing, paid general expenses, and supervised the office details. (R. 16.) There were times when it was necessary to borrow substantial sums of money which they endeavored to obtain at reasonable rates. (R. 24.) They personally directed the work of the employees, obtained new tenants, pacified old ones, and devoted "their entire time, energy and ability to the successful operation of the trust properties". (R. 16.)

The Board of Tax Appeals found as a fact that the trustees were carrying on a business and that (R. 18):

> * * * although they [trustees] did not exercise all of the powers given to them in the trust instrument, were engaged, nevertheless, in carrying on a business for profit in *much the same manner as the directors of a corporation are associated together for the purpose of carrying on a business enterprise.* (Italics supplied.)

While no certificates were issued to the beneficiaries, there was, nevertheless, no prohibition against assigning their interests. Nor was there

any provision preventing them as beneficiaries from directing and controlling themselves as trustees in the performance of the trust's activities. Although the trustees held no meetings and therefore could keep no records of such proceedings, yet they must have kept rather elaborate books, as is evidenced by the finding of the Board that (R. 16):

> An office force of three persons, besides the three operating trustees, is required to keep the necessary financial records of the trust.

The trust indenture provided that the beneficiaries were to have no interest in the trust property itself, and that the interests of the beneficiaries were to be personal property. Provision was made for the distribution of profits by the trustees annually, or oftener if convenient. A further provision sought to relieve the beneficiaries of any personal liability. (R. 17.)

The Commissioner determined that the petitioner, in quasi-corporate form, was actively engaged in the conduct of a business enterprise (R. 6–7), and, therefore, taxable as an association. The Board of Tax Appeals upheld this determination, but was reversed by the Circuit Court of Appeals.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in reversing the determination of the Board of Tax Appeals that Coleman-Gilbert Associates is an association.

REASONS FOR GRANTING THE WRIT

1. In deciding this case the court below recognized the hopeless confusion existing among the decided cases on this issue, saying:

> There are numerous decisions of the Board of Tax Appeals and Circuit Courts of Appeals in review, without laying down any definite line of demarkation between an association and a pure trust. In some instances the courts have based their decisions on the rule that where the administrative board has construed an ambiguous or indefinite definition in a statute and no change was made in a later Act of Congress, it is presumed that Congress had adopted the definition adopted by the administrative board; in other cases the courts have been influenced by other considerations: the limited activities of the trustees, and the purpose of the trust. In any event, *the decisions are seemingly in a hopeless state of confusion.* (Italics supplied.)

In the light of such confusion,[1] the question involved is one of general importance, since there are numerous cases now in litigation and in the Bureau of Internal Revenue involving the taxability of

[1] Some of the existing confusion may perhaps be due to the fact that most cases raising this issue are *income* tax cases, while *Hecht* v. *Malley*, 265 U. S. 144, regarded by many as the leading case, involved an excise tax on *doing business*. It may be, therefore, that the degree of activity on the part of the trustees need not be as great in the income tax cases in order to tax the organization as an association.

trusts as corporations. Presumably aware of the importance of the issue, this Court on May 13, 1935, granted a petition for certiorari in *Morrissey* v. *Helvering*, 1934 Term, No. 834, which was based in part upon a conflict with the decision in the instant case.

2. The decision below is in substantial conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Swanson* v. *Commissioner*, decided April 10, 1935, not yet reported, but printed in full as Appendix B to this petition.

Therefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MAY 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 2. (a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

(U. S. C. App., Title 26, Sec. 1262.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 878, 880:

SEC. 701 (a) (2) is identical with Section 2 (a) (2) of the Revenue Act of 1926, *supra*.

SEC. 704. TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.

* * * * *

(b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

Regulations 69, promulgated under the Revenue Act of 1926:

ART. 1502. *Association.*—Associations and joint-stock companies include associations, common-law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 2.

ART. 1504. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341–347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even

in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute.

Regulations 74, promulgated under the Revenue Act of 1928:

Articles 1312 and 1314 are substantially the same as Articles 1502 and 1504 of Regulations 69, *supra*.

APPENDIX B

In the United States Circuit Court of Appeals for the Seventh Circuit

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No. 5280. October Term, 1934, April Session, 1935

JOSEPH E. SWANSON, ET AL., TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decisions of the United States Board of Tax Appeals

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April 10, 1935

Before EVANS, SPARKS, and FITZHENRY, *Circuit Judges.*

FITZHENRY, *Circuit Judge.* This is a petition for review of decisions of the United States Board of Tax Appeals affirming the decision of the Commissioner of Internal Revenue that deficiencies of income tax were due from the Lake View Land Association. The Board found that the case is substantially the same as that of *Joseph E. Swanson, et al., Trustees of the Fullerton Parkway Land Trust,* 29 B. T. A. 1123, and is governed by the decision in that case. The only issue on this review is whether the income of the Lake View Land Asso-

ciation for the years 1925 and 1926 is subject to tax as the income of a trust under Section 219 of the Revenue Act of 1926 or as an "association" under Section 2 (a) (2) of that Act.

Joseph E. Swanson and Ralph C. Otis were the owners of a three-story apartment building containing nine apartments. On June 1, 1915, they entered into a trust agreement for the purpose of carrying the title to the real estate. The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. In 1926, James Otis succeeded his father as trustee.

Under the trust agreement, the trustees were given the complete management and control of the property, to exchange, reconstruct, remodel, sell or improve at their discretion or to borrow money secured by the property. They were authorized to rent suitable quarters for the transaction of the business of the trust and employ such assistants as they required.

The agreement provided for the issuance of "receipts" to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued; that neither the trustees nor the beneficiaries should be personally liable and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expi-

ration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary.

The case differs from that of Joseph E. Swanson, *et al,* Trustees of the Fullerton Parkway Land Trust in that the Lake View Land Association acquired a complete building, whereas, the Fullerton Parkway Land Trust purchased a piece of vacant property and erected the building upon it.

The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the affairs of the property, kept no minute book, had no bylaws. They elected no officers and no so-called board of directors.

From the above analysis of the agreement which created Lake View Land Association, the conclusion is inescapable that it was a corporation in everything but the name and seal and the fact that its business was carried on without holding formal meetings, adopting resolutions, and keeping minutes. A group cannot organize and carry on business and escape taxation as a corporation on so slight a distinction.

In *Tyson* (*Chicago Real Estate Trust*) v. *Commissioner,* 68 F. (2d) 584, 587, this Court said:

> That the organization of the trustees was of a very loose and informal character we think is not sufficient to take them out of the classification contemplated by the adminis-

> trative regulations cited. Even though no formal meetings of the trustees were held, they had adopted a regular practice for the administration of their trust. * * *. It is true that neither the trustees nor the receipt holders ever drew up a code of rules or by-laws for the government of the trust, but such action seems entirely unnecessary in view of the comprehensive nature of the trust agreement under which they were organized in the first place. We think these facts are sufficient to warrant our classifying petitioners as a quasi-corporate organization in form and procedure and as such taxable as a corporation.

Petitioners contend that they were not carrying on a business enterprise but were merely serving to hold the title to the real estate. It is true that the active management of the property seems to have been left to Joseph E. Swanson, one of the trustees who was also a member of a real estate firm known as Willoughby & Company. Ralph C. Otis had his office in the same building and frequently consulted with Swanson in regard to the management of the trust company. The question therefore resolves itself into this: Can the trustees avoid the conclusion that they are carrying on a business enterprise by turning the management of their affairs over to one of their number as a partner in another enterprise which handles the affairs of the association with the advice of the other trustees? We believe the answer to be that the trustees in this case were an association carrying on a business enterprise, personally and through their agents and employees.

Affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1958